No. 96-1520

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

RICHARD R. MUSE, *et al.*,
Individually and on behalf of Others Similarly Situated,
Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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This Supplement addresses matters set forth in Reasons II and III of the Petition for Writ of Certiorari, at 16-22, and is necessitated by the March 21, 1997 decision of the Second Circuit in *Ballone v. Eastman Kodak Co.*, —— F.2d ——, 1997 U.S. App. LEXIS 5430 (2nd Cir. 1997) [Appendix at 1a].* *Ballone* underscores just how far afield the Sixth Circuit is from the decisions of this

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* The decision in *Ballone* was not accessible through LEXIS ® until March 25, 1997, the date on which the within Petition was filed. Accordingly, it was not available at the time of Petitioners' last filing, but it may affect this Court's consideration of the case.

Court. The case under review, *Muse v. IBM*, 103 F.3d 490 (6th Cir. 1996) [Petition Appendix at 1a], is in direct and irreconcilable conflict with *Ballone* and this conflict further illustrates the growing confusion which exists in the lower federal courts regarding the scope of an employer's fiduciary duty to communicate truthfully with employees regarding voluntary severance plans covered by ERISA. Because the use of such a plan is widespread and frequently is the key component of corporate downsizing efforts, it is of continuing importance to both employers and employees that this Court address the questions presented in *Muse* and clarify this significant area of ERISA law.

Mirroring the approach of the district court and Sixth Circuit in *Muse*, the district court in *Ballone* limited its deliberation (through a bench trial) to a single question —whether the employer was "seriously considering" implementing an enhanced plan at the time it made the alleged misrepresentations. As in *Muse*, "[b]ecause the district court believed that the lack of serious consideration of [that plan] by Kodak made any alleged misrepresentations immaterial, it did not examine any of the misrepresentations in detail." [Appendix at 6a]. The questions posed in *Ballone* are straightforward:

> We first address the district court's conclusion that "serious consideration" of a plan change is a prerequisite to materiality, where a plan fiduciary makes alleged misrepresentations to ERISA plan beneficiaries leading them to believe that future plan changes have been ruled out. We hold that it is not. We next address the court's conclusion that absent serious consideration of plan changes, no statement about future plan benefits can be misleading. We disagree with the district court's conclusion on this point as well.

Id. at 7a.

Relying principally upon *Varity Corp. v. Howe*, 516 U.S. ——, 134 L.Ed.2d 130, 116 S.Ct. 1065 (1996)

the crux of the Second Circuit holding is captured in the following:

> Applying these trust-law principles, it is clear that Kodak may not actively misinform its plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would, *regardless of whether or not it is seriously considering future plan changes.* Kodak has a duty to deal fairly and honestly with its beneficiaries.

Id. at 10a. (emphasis added).

The contrast and conflict between the holdings in *Ballone* and *Muse* is stark and overwhelming:

> Any misrepresentation IBM made to the plaintiffs after it gave serious consideration to the implementation of an enhanced incentive plan could constitute a breach of its fiduciary duty under ERISA. *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988). *However, misrepresentations made before serious consideration trigger no such duty.*

Muse, Petition Appendix at 6a. (emphasis added).

Muse thus holds that serious consideration of a particular plan for a particular purpose is the singular factor that must be found to exist under any and all circumstances. Until that date is established, the duty to avoid material misrepresentations does not exist and the trier of fact has no obligation to determine whether there were any misrepresentations and, if so, whether they were material. Under *Muse*, an employer/fiduciary may lie to plan participants about the availability of a future plan with impunity at any time before the serious consideration date has been reached. *Ballone* directly challenges that rationale:

> [Although] Kodak need not be prescient, an employer does not enjoy carte blanche to make statements that the employer knows to be false, or that have no

> reasonable basis in fact, simply because the statements concern the future.

Appendix at 15a.

In its application and interpretation of the *Varity Corp.* principle, *Ballone* rejects the *Muse* holding that a finding of serious consideration is mandated before the fiduciary duty to avoid material misrepresentation arises. Similarly, in its explanation of *Mullins v. Pfizer, Inc.*, 23 F.3d 663 (2nd Cir. 1994), and its application and interpretation of the materiality standard set forth in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), *Ballone* rejects the *Muse* holding that a single fact or occurrence [whether it be "serious consideration" or "a particular plan for a particular purpose"] always will be determinative of and precede the inherently fact-specific finding of materiality. *Ballone* also confirms that misrepresentations are material if they would induce a reasonable employee to rely upon them. [Appendix at 7a]. *See*, Petition at 18.

In sum, *Ballone* is the embodiment of the conflict between *Muse* and *Varity Corp.* and *Basic*. In its own right, *Ballone* represents yet another example of the ongoing conflict among Circuits, now expressed in terms of whether serious consideration is a prerequisite to a finding of material misrepresentation and the attendant ERISA fiduciary duty or whether it is nothing more than one of several factors to be examined in the context of materiality of false assurances. [Appendix at 12a]. However phrased, the conflict continues and only this Court's review and resolution can bring certainty and closure to the issues raised herein.

CONCLUSION

The Petition for a Writ of Certiorari, as supplemented, should be granted.

Respectfully submitted,

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